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Enforcement of Restrictions by Homeowners Associations: Balancing Individual Rights and Community Interests

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Balancing Individual Rights and Community Interests

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Residential developments often create a general scheme of restrictions, operate common facilities, and establish an owners association to enforce the restrictions and operate the common areas. Private governments raise difficult public policy and legal issues. Private regimes should generally be enforced as they encourage the efficient use of land, allow choice in living arrangements, and foster participatory democracy. At the same time, though, the restrictions can offend personal autonomy, create inefficiencies, and permit undue control by past generations over present owners.

The law should therefore enforce homeowners association covenants that prevent harmful fallout on the neighborhood, but they should not uphold the few covenants that offend the personal autonomy of the current owner. Moreover, the law should require that community associations treat owners equally, employ fair procedures, and refrain from making irrational decisions.

Over the past thirty years, there has been a tremendous growth in private communities. In these regimes, the owners are subject to a scheme of restrictions on land use and owner behavior. The restrictions are administered and enforced by an association of the owners, which also has the power to set rules and regulations binding the properties. These associations function as *private* governments, and are not subject to the constitutional doctrine and statutory rules that limit and shape the actions of *public* government.

These private land use controls and private governments bring important benefits by promoting efficient land use, freedom of choice in living arrangements, and democratic self-determination. They also, however, raise serious questions about the rights of the individual and the extent and nature of permissible regulation by the community. Courts often must resolve disputes between owners and the community over the substance of the restrictions and the decision-making process of the homeowners association. This article will critique the conflicting policies and suggest how the law should balance these competing interests.

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This inquiry can provide guidance to planners, developers, and lawyers in creating enforceable restrictions and structuring viable homeowners associations. Private governments deserve the attention of public-sector planners and policy makers for a number of reasons. First, homeowners association developments may have an impact on the larger community outside of the development. For example, owners who are paying assessments to the association for private services such as recreation and security may resist paying their fair share of the public tax burden necessary to provide parks and police protection for the larger community. A private government may in effect provide the means for owners to secede from the larger body politic, thus hampering efforts to address general social problems. Moreover, homeowners associations are regulated by government through condominium, common interest ownership, and planned unit development legislation and through zoning and the subdivision process. Through these vehicles, planners and public officials may be able to influence the balance that is struck between the homeowners association's interest and the individual rights of the owners. Finally, private government and public government may learn from the experience of the other in dealing with conflicts between the will of the majority and the wishes of the dissenter. Both face similar issues, such as balancing architectural controls with free expression, occupancy restrictions with family privacy, and speedy remedial action by the community with due process considerations.

Two recent items, from a long list, illustrate the tension between owners and private governments. The first example deals with a private subdivision that barred the use of the houses by "more than one family" (*Feely v. Birenbaum* 1977). Two unrelated men purchased a home in the subdivision as co-owners. In an enforcement action brought by the homeowners association, the court held that the restriction was valid and that the term "family" did not include persons unrelated by blood or marriage. The court issued an order barring the two owners from residing together in the house. It is important to note that the case involved removal of an *owner*, not a rental tenant, from his home. One may wonder whether this case reached a proper balance between, on one hand, the values of the community and the majority, and, on the other hand, the individual's property rights and personal autonomy.

A second item involved a condominium owner (a 51 year old professional woman and grandmother) who was sent a notice from her condominium association as follows: "Description of violation: resident seen parking in circular driveway kissing and doing bad things for over one hour." The association threatened to impose a fine if it happened again. The notice was also posted publicly at the condominium, employing public humiliation to achieve compliance with rules and regulations. The incident was covered in the local and national print and broadcast media. As things turned out, the association had made a mistake, and the notice was meant for a 17 year old woman and a 21 year old man who had been "parking" that evening. For that mistake, the condominium owner suffered public humiliation and damage to her reputation at work; some of the nicer names she was called included "hot lips," "marathon kisser," and "the kissing bandit" (Dodson 1991; Lichtblau 1991; Willman 1991). Again, certain questions emerge from this episode: Should associations be regulating such matters? Does the behavior of the association in this case give us confidence in the exercise of discretion by private governments and the process that they use? Where was the notice, opportunity to be heard, and neutral decision-making that we require as a legal matter from *public* government?

Use of Private Land Controls

Historical Roots

Some historical background is necessary to assess the desirability of private land use controls. Private land use controls have long been employed to allocate non-possessory rights in the land of another. These interests have traditionally been referred to as "easements" and "covenants." An easement usually gives a landowner an affirmative right in another person's property, such as the right to use a path or roadway. A covenant typically imposes a restriction on the use of a parcel of land, such as barring nonresidential uses; the holder of a covenant, usually a neighbor, thus has a veto power over the development of another's land (Korngold 1990). Recently, scholars

TABLE 1: Percentage of Community Associations Institute member associations (by unit size) that offer seven of the most common amenities:

	Number of Units or Homes				
Amenity	≤ 50	51-150	151-350	351-500	501+
Pool	43%	64%	76%	74%	75%
Playground	15%	27%	37%	42%	47%
Park Area	20%	26%	29%	51%	52%
Clubhouse	12%	37%	56%	61%	60%
Tennis	13%	31%	45%	52%	58%
Lake/Pond	13%	22%	30%	42%	42%
Golf Course	1%	2%	4%	4%	19%

Source: Community Associations Institute 1993, 20.

have referred to easements and covenants collectively as "servitudes."

Private land use controls have long been recognized, with examples dating from Roman and early English law. In the modern era, these rights have become even more important. The industrial revolution brought a demand for railroad and canal rights-of-way and for rights over neighboring lands to exploit resources and to build efficient manufacturing operations. Perhaps as a direct result, restrictions became imperative to designate residential areas as havens from the industrial and commercial world (French 1988).

Modern Applications

At the end of the twentieth century, private land use arrangements play an even more important role. Society faces a decreasing amount of usable land, urban and suburban sprawl testing transportation networks, increased interdependence of landowners due to geographical proximity, and environmental fallout due to poorly planned development of earlier times. Thus, over recent years, there has been an increased use of traditional easements, such as rights-of-way, pipeline and utility easements, and resource extraction rights. New easements have also been developed to meet commercial, social, and technological advances. These include telecommunications easements; solar and wind easements to prevent interruption of sources of alternative energy; conservation and historical easements that prevent degradation of natural areas or architectural features; and beach access easements to allow the public to reach the seashore.[1]

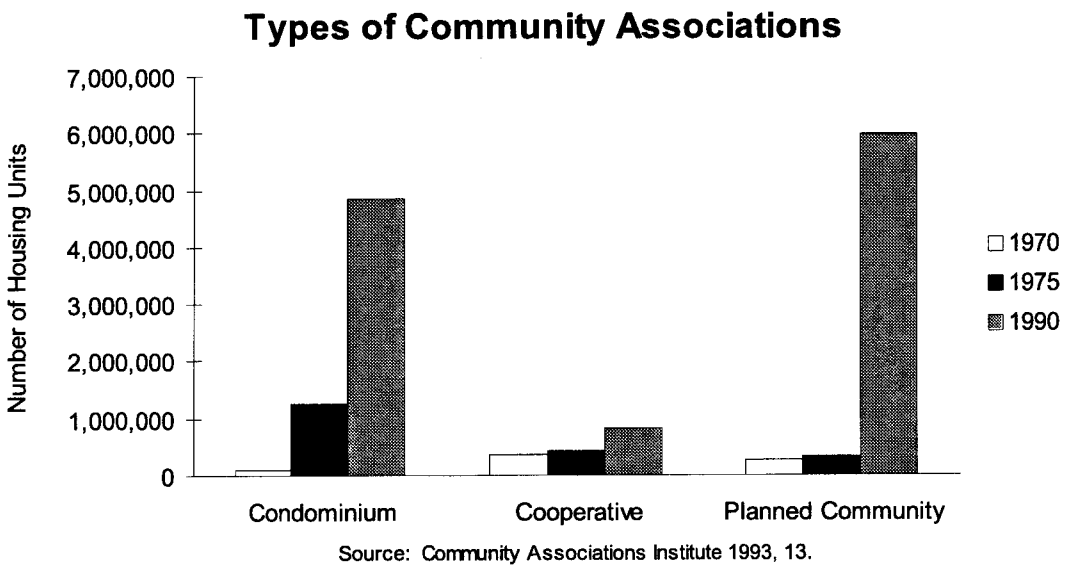
Servitudes are also being used today in a comprehensive manner. Easements and covenants are almost always used today in shopping centers and office and industrial parks in order to restrict the types of businesses, regulate the type and manner of construction, grant rights of access and use, and allocate expenses for commonly shared facilities such as roads and utilities.

Community Associations

Importantly, there has been an increasing use of private controls in the housing arena. Residential developers often employ servitudes in tract and high-rise developments to increase the desirability of the housing units. Typically, the developer imposes restrictions on the use of the property and types of construction and structures. Often the owners receive rights in common facilities serving the development, such as roads, utilities, and recreational areas, with a covenant providing for the payment of fees by the owners to operate the facilities. Table 1 describes the amenities provided by community associations that are members of the Community Associations Institute, a national, nonprofit association.

Furthermore, an increasing number of these developments create an association of the unit owners. The association administers the servitudes through decisions of the entire body or a subgroup, and essentially functions as a private government pursuant to authority granted by the servitudes. The association usually operates, maintains, and sometimes owns the shared facilities. The association may also be empowered to set rules and regulations, enforce violations (such as noise and pet rules), make discretionary decisions and approvals (such as ar-

Figure 1:



Source: Community Associations Institute 1993, 13.

chitectural plans), provide other services (such as security and trash collection), and levy, collect, and disburse dues from the owners to pay for these activities. These servitude regimes may be organized as a tract development with a homeowners association, a condominium, or a cooperative; despite the differences in legal form, the policy considerations are the same, and legal results should be consistent.[2] Figure 1 illustrates the comparative numbers of these three types of communal ownership.

The growth in owner associations has been noteworthy. In 1962, there were 500 associations (Community Associations Institute 1988, 7); in 1992, estimates put the number at 150,000 (Community Associations Institute 1993, 13). In 1970, only one percent of US housing units were in owner associations; 1993 figures show that 32 million Americans live in associations, equating to nearly one out of eight people (Community Associations Institute 1993, 13). Table 2 describes the growth in housing units in community associations.

Tensions in Community Associations

Despite this great growth in owners associations, there are some warning signals that bear watching. News items and court decisions have reported conflicts within associations; these can be broken into certain rough categories:

Disputes between the community and the individual: Sometimes there is a conflict between the majority's goals and the individual's autonomy. Such disputes include association prohibitions of political signs and flags; the banning of outdoor swingsets; the prohibition of Christmas lights, stars of David, or a *succah*, a small, outdoor structure used to observe the Jewish holiday of Succot; a battle between an association and an owner who was using the community pool for baptisms; never ending disputes over approval of architectural designs and construction materials; conflict over pet restrictions; and the family-type restriction described earlier.[3]

Governance problems within the community association: In other situations the community association decision-making process breaks down and something other than effective and fair, democratic self government is taking place. One recent case illustrates some of the disorder that can result in private governance. In this case, at the meeting of the owners of a New York City cooperative building, one owner publicly threatened to kill another, a pregnant woman, over a dispute about governance of the cooperative. As a further irony, when the threatened owner brought a suit against the threatener claiming that the act amounted to an intentional infliction of emotional distress, the court dismissed the action. The court gave the surprising explanation that the threat was not "extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intoler-

able in a civilized society" (*Owen v. Leventritt* 1991, 26). While this is certainly a unique story with an odd disposition of the legal claim, it does raise questions about the quality of discourse and governance in community associations and the acceptable social norms in such situations.

Comprehensive challenges to the community association structure: In some situations, the whole notion of private government is questioned. Consider current developments in Columbia, Maryland, which was founded over 27 years ago as a planned community and is currently home to 80,000 people. The community association there owns and operates the city's open space and recreational areas. A group of dissident owners are engaged in a petition drive seeking a referendum to incorporate Columbia as a city and to end the *private* government of the association. The dissidents claim that the Columbia Association is fiscally irresponsible and that it provides only "symbolic democracy," not "real democracy" (Sachs 1994a, 1994c). A leader of this group stated that "there had to be a way in which citizens have control over finances and policies. That's the purpose—Jeffersonian democracy" (Sachs 1994b). The defenders of the Columbia Association reject the dissenters' view. They believe that the association functions efficiently and openly, and that a city government would be more expensive than the current association system. In their view, the private association structure is essential to achieve the Columbian vision of the good life.

In determining how the law should react to the conflicts over servitudes and private residential governments, it must be recognized that courts, in deciding cases, choose between competing arguments of the litigants. Sometimes these choices are mandated by a clear, binding precedent of a prior decision, on which people have relied in planning their actions. In other cases, though, the court is dealing with a legal question that has not been previously decided or that presents a new wrinkle. In the latter, the court must understand the public policies inherent in the dispute and select a rule that will best effectuate societal goals. Finding that public policy is not always easy, but choosing among competing policy arguments is something that Anglo-American common law decision-makers have done from the time the first wise man stood under a tree at the village green in medieval England and decided a dispute between two people over ownership of a cow. It is thus imperative to understand the policy considerations inherent in servitudes and community association disputes.

Policies Favoring Servitudes

The enforcement of servitudes validates private consensual arrangements, based on choices made in the marketplace. This enforcement is consistent with the law's long-standing respect for "freedom of contract." There are several benefits from enforcement of these private arrangements, and these policies are reflected in various judicial decisions.

Efficiency

Servitudes permit the efficient allocation of limited land resources. By using servitudes, people can buy the specific rights in land that they want without having to spend more than they wish. For example, if A, the owner of Lot 1, wants to prevent the lot next door (Lot 2), owned by B, from having a factory built on it, A can buy a covenant from B, for, hypothetically, $20. If A could not buy a covenant, he would have to spend $100, hypothetically, to purchase the entire property interest (i.e. fee simple title) in Lot 2. That would be a waste of A's resources

TABLE 2: Number of Community Association Housing Units

	1970	1975	1990
Total CA Units	701,000	2,031,439	11,638,921
Total Associations	10,000	20,000	130,000
Total Number of Housing Units	63,445,192	67,640,000	102,263,678
CAs Percent of All Housing	1.11%	3.0%	11.38%

Source: Community Associations Institute 1993, 13.

that could be better put to another use. In addition, Lot 2 would be unavailable to another person who would have been happy to buy it for nonindustrial uses.

Moreover, community association servitudes bring extra efficiencies beyond traditional servitudes. Community association servitudes provide common facilities (such as utilities and recreation areas) that individual owners could not afford. Developer costs can also be lowered due to planned unit development (PUD) zoning, and the developer can avoid the expenses necessary to meet governmental dedication standards if common facilities are retained and administered by the community association (United States Advisory Commission 1989, 4). These savings can be passed on to the homeowners.

Judicial decisions recognize that people will not enter into such efficiency-maximizing arrangements if the law will not enforce them. As one court stated, "Those individuals who have invested their life savings in a home, 'The American Dream,' are entitled to protection under the law, including enforcement of the covenant, which they relied on when investing in the area" (*Kiernan v. Snowden* 1953).

Moral Obligation

The law has also enforced private land use controls on moral grounds, finding that people are morally obligated to live up to their promises. It would not be proper to allow a person to buy land for a reduced price because of the presence of a covenant and then resell it for a higher price free of the covenant (*Tulk v. Moxhay* 1848). For example, one court enforced an adults-only restriction in a condominium, barring the unit owners—a married couple—from living there with their newborn baby. The court stated: "All young couples buying living units can foresee the possibility of children and this restriction has not 'snuck' up on them, for they well knew of it prior to purchase or conception. The choice was theirs"[4] (*Franklin v. White Egret Condominium* 1977).

Freedom of Choice

The courts also enforce covenants because they represent the voluntary choices of people. Servitudes allow individuals to create an environment that they believe will maximize their self-fulfillment. In an era of diminishing resources and increasing pressures of daily life, it is important to allow people to create their own home and community environments, as places of renewal. In exchange for happiness and peace of mind from the servitude regime, the owners accept community restrictions and power. One noncomplying owner should not be allowed to unilaterally destroy the free choice and quality of life of the rest of the community. Thus, one court recognized the role of the association to "promote the health, happiness, and peace of mind of the majority of the unit owners" (Hidden Harbour Estates, Inc. v. Norman 1980).

Community Associations

Moreover, the law has recognized that there are special benefits in having a system of reciprocal servitudes administered and enforced by a community association. Covenants are "reciprocal" when all lots have the same restrictions on them, giving each owner the same burdens and benefits. With reciprocal covenants, neighbors may be more willing to compromise when there are conflicts or questions about covenant enforcement because of the social norms favoring neighborly cooperation. Also, there is self-interest—an owner may compromise on an enforcement question today since in the future the owner herself may seek an accommodation from her neighbor.

Furthermore, flexibility is increased if the covenants can be amended or modified by the consent of less than 100 percent of the owners. Holdouts are thus prevented, and the community can achieve necessary change without making "blackmail payments." An association can also be given, in the original documents creating the development, the right to exercise discretion. This is beneficial since some issues cannot be determined at the time the community is created, such as the amount of dues necessary to run the common facilities ten years into the development.

Moreover, the association structure permits democratic self-determination. The owners are empowered to participate in the decisions affecting local land policy and to vote on community directions. One commentator observed about public land use regulation: "Local governments are the last direct contact that the average citizen has with the idea of government; it is the only place where the citizen

still feels that his individual participation might make a difference" (Krasnowiecki 1980, 722).

These words resonate loudly in light of current thoughts about devolution of governmental control, which tend to advocate a transfer of political power from larger entities to local groups. Moreover, there are echoes of the message of the communitarians, with their focus on an increased sense of community and individual responsibility.

Problems with Servitudes

Although there are great benefits from servitudes and community associations, these must be balanced against the costs. There are two problem areas: the first involves the permissible subject matter of servitudes, and the second concerns the behavior and functioning of private residential governments.

Subject Matter

There are concerns about some types of restrictions. While, as described earlier, some courts have stated the benefits of servitude arrangements, other courts have taken a contrary view.[5] This contrary view maintains that the law favors the free and unrestricted use of land and is suspicious of land use restrictions. A covenant is a perpetual restriction. Unless specifically limited by the parties at the time of creation, a covenant will remain attached to the land forever. It will bind not only the original purchaser of the burdened property, but all subsequent owners as well. This could be a problem. Current or future owners cannot change the use of the land to meet the needs of society as reflected in the marketplace if such changes would result in violation of the covenant; thus, efficient use of limited land supply may be frustrated.[6] One court addressed this concern when it stated: "This court has serious reservations about the wisdom of allowing provisions contained in a 1949 real estate transaction ... to prevent the development of a substantial piece of real estate in 1978" (*In re Turners Crossroad Development Co.* 1979).

The age old battle of the generations is also a relevant concern. Judicial enforcement of a perpetual covenant created in the past achieves the vision of a previous generation, which may thwart the aspirations and personal autonomy of the current owner. Also, we must take care that in enforcing servitudes to achieve communal goals, we do not intrude into the family home, which we have long valued as a private refuge from the larger world.[7]

Therefore, the law must balance the costs and benefits of servitudes. I would support the enforcement of a restriction only to the extent that it regulates an owner's *external* behavior rather than her status or private conduct. Courts should thus uphold restrictions that control harmful spillovers on the community that arise from an owner's use of her property (such as noise or traffic). Courts should not, however, enforce controls on personal choices within a home. Returning to the earlier example of the two male co-owners, a court should not enforce the covenant to bar them, as they create no greater noise, traffic, or other fallout on the neighborhood as compared to a "traditional" family. Some courts have recognized this distinction where neighbors attempted to bar group homes for the physically challenged or emotionally disturbed. In one such decision, the court noted that "from the *outside*, the home looks like all other single family homes" (*Costley v. Caromin House, Inc.* 1981). This distinction needs to be adopted by other courts and applied in other situations.

Under my test, covenants would be enforceable in most every situation. For example, aesthetic and architectural covenants would be valid, as they control harmful spillovers that can harm property values and visual ambiance. If a person does not want to be so restricted, then he can simply choose not to buy in the community. Or if he did buy and now does not like the servitudes, then he can sell and move out. But he should not be permitted to stay and devalue the scheme for the rest of the owners. Only in the unusual case where personal autonomy is threatened should the court refuse enforcement.

There is an important reason why courts should act when servitudes threaten personal autonomy. America has the terrible history of restrictive covenants, once common in this country, that barred occupancy by African Americans, other nonwhites, and religious minorities (Marsh 1990, 168-170). The market mechanism was an insufficient response to this assault on personhood—on the contrary, the market demanded these covenants. In such cases, the law must deny enforcement to the private arrangement and enlightened public policy must prevail.[8]

Regulations on the exhibition of religious objects and political signs raise complicated issues that are not easily resolved. While these restrictions control aesthetic intrusions, which we normally allow the community to control, they also limit religious and political expression and practice. It should be noted that *public* regulations—not just private controls—often restrict religious and political expression in similar ways.

Association Governance

The second problem with servitude schemes relates to the behavior and functioning of community associations. As discussed earlier, community associations are private governments, and therefore not subject to the constitutional limitations and statutory controls that apply to public government decisions and methods of operation. So the question is whether private governments should be policed by the law and, if so, to what extent.

Unequal treatment:
A community association might give unequal treatment to similarly situated owners. For example, assume that an association, in response to the community's desire for additional recreation areas, locates a playground next to a particular owner's house, making her the only person in the community who has to bear the noise, litter, and other undesirable behavior that may arise from the playground.[9]

Unequal treatment in the community association context is a concern for various reasons. Private communities will be jeopardized if homeowner rights can be summarily rearranged by a tyrannical majority. Moreover, people have come to expect fair dealing in both commercial activities and in public life, and they similarly expect equal treatment in the community association context.

The courts have begun to address unequal treatment. Some decisions have reversed association actions that result in unacceptable inequality of treatment. Courts have required association decisions to be consistent with the general plan of development and the way in which other residents have been treated in similar situations (*Ridge Park Home Owners v. Pena* 1975).

One recent case illustrates this growing attitude (*Jaskiewicz v. Walton* 1988). The covenants governing the development barred subdivision of any of the lots. The servitudes also permitted amendment of the covenants by a majority of the owners. One owner wanted to subdivide his lot along the line of a ravine that bisected his lot. Twenty-three of forty-five owners agreed to the amendment of the covenants to permit this one subdivision. The validity of the amendment was challenged by some of the dissenting owners. The amendment on its face seemed to be a reasonable decision since the lot was already physically divided, the owner could not build a single home across both portions, and amendment by a majority of owners was expressly permitted by the governing documents. Balanced against this, however, was the view that amendments to the covenants should be applied uniformly to all lots, and that no special deals should be allowed because of the general expectation of equal treatment. Moreover, if ad hoc amendments were possible, one could imagine a scenario where fifty-one percent of the owners could amend the covenants to release their lots from the burden of the restrictions while maintaining the covenants on the remaining forty-nine percent. That would be an unacceptable rewriting of the initial bargain upon which all buyers relied. The scheme would be destroyed, eroding the expectations of buyers and making servitude communities less attractive. The court in this case rejected the unequal treatment and held that the amendment was invalid.

A related question is whether the association decision-making body exercises its discretion in a fair manner. One especially difficult area involves architectural regulations, since it is difficult to articulate specific standards. In a recent case, the underlying documents required that building plans be approved by an architectural control committee of association members prior to building (*Smith v. Butler Mountain Estates* 1988). The covenant did not provide any standards. An owner submitted plans for a geodesic dome, and the committee rejected them. From the owner's perspective, the absence of standards makes it difficult for an owner to predict how his vision will be treated before he invests in a lot in the subdivision. Moreover, without standards, there is a concern that the decision is merely a random event, stifling our social norm of free expression. Yet the court, in similar cases, upheld the decision of the board. Because it is so difficult to put aesthetic principles into words, and since

there is no universal agreement as to those principles, the board's decision should be upheld as long as it is consistent with the neighborhood scheme and other board decisions in similar situations. Given the clash between the traditional roof lines of the other homes and the geodesic dome, the board's decision was legally permissible.

Procedural fairness:
Owners also have a right to expect fair procedures in association decision making. Courts have imposed requirements of notice and an opportunity to be heard before the association can take action (*Hanchett v. East Sunnyside Civic League* 1985). Courts have also held that decisions must be made in good faith and that impermissible biases will not be tolerated. The harm to the woman who received the "kissing" notice from her condominium could have been averted if she had an opportunity to be heard before the association made its summary (and incorrect) judgment and imposed its humiliating punishment.

Irrational decisions:
Some owners may dissent from the wisdom of a particular decision of the association, such as parking rules, pet regulations, and recreational area rules. Still, the courts should generally defer to the decision of the association. A court should not substitute its own determination of the costs and benefits of a proposed course of action for the judgment of the association. Deference to the association's choice is proper since the association has greater expertise and knowledge of the issues, and the decisions of the community arrived at through the democratic process should be respected.

However, there is one type of situation, that does not often occur, where the court should strike down an association decision. This is when the association makes a decision that reduces the community's welfare by imposing burdens on owners but the decision does not provide *any* offsetting benefits. We might describe the association decision in such a case as "irrational."

For example, one case involved a community that banned satellite dishes on the theory that they were an aesthetic blight (*Portola Hills Community Ass'n v. James* 1992). In my view, the court correctly permitted an owner to keep his satellite dish, despite the regulation, since the layout of the owner's house and his landscaping made it absolutely impossible for anyone else to see the satellite dish. Upholding the prohibition against this owner would only impose a burden without bringing any corresponding aesthetic benefit to the community.[10]

Similarly, another case dealt with a rule that permitted only cars to be parked in carports. The court held that the rule could not be applied to prevent an owner from parking a noncommercial pickup truck that was used only for the owner's transportation to and from work. The regulation was petty and pointless, but very intrusive. The appellate court stated:

> Beauty—even with cars—is in the eye of the beholder. In this world where those persons concerned with upwardly mobile status frequently drive off-road vehicles including well-appointed jeeps or pickup trucks, we think the trial court's ruling is eminently sensible. The pickup truck, often both comfortable and economical, has become for many the equivalent of the convertible in earlier years. As times change, cultural perceptions—including society's acceptance of certain types of vehicles—also change. The pickup truck no longer has a pejorative connotation. One person's Bronco II is another's Rolls-Royce (*Bernardo Villas Management Corp. Number Two v. Black* 1987). [11]

Some people feel that judicial intervention is unnecessary in such cases. They argue that the community could simply change the rule if the community agreed that the rule was irrational (Gillette 1994). This is not convincing, however, since there are structural and practical problems that prevent the community from addressing all irrational situations. Inertia and the disinterest of the majority in the problems of the few are, unfortunately, powerful forces that often prevent a response by the community. There needs to be some recourse in the case of wholly irrational regulation.

Conclusion

Private land use controls and community associations bring great benefits and should be respected in virtually all situations. In some special cases, though, the public interest requires that the private agreement should not be enforced. Although the exact dividing line may not always be clear, courts

can reach the best results if they base their decisions on a consideration of the underlying policies discussed in this article. The law has always been, and always should be, evolving, as it responds to new developments in society and emerging policy concerns. As land policy is rethought and redefined to meet the challenges of the future, the law must provide a means to implement society's vision of how we should utilize our precious and limited land resources.

NOTES

1. For further descriptions of these devices: *Nollan v. California Coastal Commission* 1987; Degan 1973; *Centel Cable Television v. Cook* 1991; Korngold 1990.

2. Different legal devices may be used to create a servitude regime and private government—a development may be organized as a condominium, with a condominium association and the board as a subgroup; or as a tract or townhouse development, with a governing body called a homeowners or property owners association; or as a cooperative, usually organized as a corporation with a board of directors. Despite different legal forms, the policy considerations are the same; and since good legal analysis does not favor form over substance, the technical differences in structure should not yield different results. These various legal devices are described in Natelson 1989. The figures from 1990 indicate that of the total associations 42% were in condominiums, 7% were in cooperatives, and 51% were in planned community homeowners associations. Community Associations Institute 1993, 13.

3. For documentation of these events see *Linn Valley Lakes Property Ass'n v. Brockway* 1992 (sign); *Gerber v. Longboat Harbor North Condominium, Inc.* 1989 (flag); Earnest 1991 (swingsets); Brooks 1988 (holiday decorations); Higgins 1990 (succah); *Nahrstedt v. Lakeside Village Condominium Ass'n* 1994 (pet restriction).

4. Discrimination against sales of homes to families with children in now unlawful under the federal Fair Housing Act, 42 U.S.C. § 3601, unless exempt housing for older persons is involved. See *Massaro v. Mainlands Civic Ass'n*, 3 F.3d 1472 (11th Cir. 1993).

5. For example, *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d 407 (Mo. 1986).

6. In *Ervin v. Deloney Construction, Inc.*, 596 So. 2d 593 (Ala. 1992) the court used its power to interpret a covenant to avoid a restriction that would greatly reduce the land's development. The court held that a small encroachment of a swimming pool on a neighbor's lot was not a "structure" that would bar neighbor from building a house on the property since that would render the neighbor's lot useless.

7. See Gordon 1978, 66-68 and Clark 1986, xi-xvi, discussing American family home as place of refuge.

8. Racial covenants were voided by an expansive use of state action doctrine on constitutional grounds. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

9. See *Killearn Lakes Homeowners Ass'n v. Sneller*, 418 So. 2d 1214 (Fla. Dist. Ct. App. 1982).

10. See *Brock v. Strole*, 63 Ohio App. 3d 96, 577 N.E.2d 1168 (1989) (underground culvert not an impermissible "structure").

11. See also *Justice Court Mutual Housing Cooperative, Inc. v. Sandow*, 50 Misc. 2d 541, 270 N.Y.S.2d 829 (1966) (rule limiting the playing of musical instruments by any individual to one and one-half hours a day was drawn too roughly to address legitimate noise problems and merely put a burden on the owners).

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